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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

EFFECT OF PROPOSITION 208 RULING ON
SAN DIEGO'S CAMPAIGN CONTRIBUTION LIMITS

On January 6, 1998, Federal District Court Judge Lawrence K. Karlton found that the anchor provisions of Proposition 208, adopted by California voters in the November 1996 election, were constitutionally infirm. He enjoined enforcement of the entire proposition pending the California Supreme Court's resolution of severability and reformation issues. California Prolife Council Political Action Committee v. Jan Scully, No. S-96-1965, — F. Supp. —, 1998 WL 7173 (E.D. Cal. January 6, 1998). Among other things, Judge Karlton singles out the City of San Diego's campaign contribution limits for special comment. California Prolife Council, 1998 WL 7173, at *10 n.37. Because of the significance of the case and because the court specifically comments on San Diego's laws, we want to give you a brief analysis of the case and its effect on enforcement of the City's laws.

ANALYSIS OF CASE

Plaintiffs challenged Proposition 208 in federal court. No state court had reviewed Proposition 208's constitutionality. As a result, although the federal court invalidated the entire proposition, it acknowledged that some parts were "conceivably" constitutional. California Prolife Council, 1998 WL 7173, at *12. The case was brought by a political action committee (PAC), various labor unions and their PACs, individual contributors to political campaigns, candidates and prospective candidates, officeholders, the Republican and Democratic parties, and two professional slate mailers. The case was defended by the Fair Political Practices Commission (FPPC) and the proponents of the proposition, who acted as intervenors.

Plaintiffs and defendants agreed, and the court found, that the proposition's contribution limits were the linchpin of a complex statutory scheme and that, if the contribution limits failed, the whole scheme was in doubt. California Prolife Council, 1998 WL 7173, at *5. At trial, in a

characterization that became pivotal to the court's ruling, the proponents described the proposition as a "system of 'variable contribution limits.'" California Prolife Council, 1998 WL 7173, at *5. Specifically,

> [t]he statute prohibits any person, broadly defined to include virtually any entity other than a political party and a small contributor committee (as defined by the statute), from contributing more than $100 per election in small local districts (less than 100,000 residents), $250 per election for Senate, Assembly, Board of Equalization and large local districts, and $500 per election for statewide office. Section 85301(a)-(c) . These limits are increased to $250, $500 and $1,000, respectively, for candidates who agree to specified expenditure limits. Section 85402.

California Prolife Council, 1998 WL 7173, at *5 (footnote omitted).

The proposition also limits contributions to PACs and to political parties, and places an aggregate limit on the amount any person may contribute to all candidates and political parties combined in a two-year period. Cal. Gov't Code §§ 85301(d), 85303 and 85310; California Prolife Council, 1998 WL 7173, at *5.

A. Standard of Review Applied in Contribution Limit Cases

The court accepted as a given that limits on campaign contributions operate in the First Amendment area. California Prolife Council, 1998 WL 7173, at *6. Previous cases established that contribution limits affect two overlapping and blending fundamental rights—the right of expression and the right of association. California Prolife Council, 1998 WL 7173, at *6. The court determined that even contribution limits "significantly interfering" with these rights will be upheld if the state (1) demonstrates a sufficiently important interest, and (2) employs a measure closely drawn to avoid abridgement of First Amendment freedoms. California Prolife Council, 1998 WL 7173, at *6, citing Buckley v. Valeo, 424 U.S. 1, 25 (1976). The court specifically determined that laws limiting campaign contributions such as Proposition 208 are not required to undergo the most stringent judicial scrutiny that has been applied to some laws that infringe First Amendment rights, for example, to laws that limit independent expenditures. California Prolife Council, 1998 WL 7173, at *6, 9.

B. Legitimacy of Governmental Interests Justifying Proposition 208's Contribution Limits

Plaintiffs mounted a three-pronged attack against the proposition. They challenged (1) whether the governmental interests asserted to justify the proposition were legitimate, (2) whether the proposition was narrowly drawn to address those interests, and (3) whether the proposition affected First Amendments rights not only of contributors but also of candidates in such a way as to impermissibly limit effective advocacy.

The United States Supreme Court had previously recognized two legitimate state interests justifying contribution limits: (1) the interest in preventing corruption or the appearance of corruption, and (2) the interest in "limiting the corrosive and distorting effects of immense aggregations of wealth with the help of the corporate form that have little or no correlation to the public's support for the corporation's ideas." California Prolife Council, 1998 WL 7173, at *7, citing Federal Election Comm'n v. Nat'l Conservative Political Action Committee, 470 U.S. 480, 496-97 (1985); Austin v. Michigan Chamber of Commerce, 494 U. S. 652, 660 (1990).

In striking down Proposition 208, based on evidence presented at trial, the court found actual corruption had occurred in California legislative races (but the judge specifically mentioned he had heard no evidence of actual corruption in election of persons to the state's executive or judicial branches). California Prolife Council, 1998 WL 7173, at *8. The judge found other evidence to support the electorate's apparent interest and belief in the importance of preventing not only actual corruption, but also the appearance of corruption. The court concluded, therefore, that there was a legitimate governmental interest served by limitations on campaign contributions. California Prolife Council, 1998 WL 7173, at *8.

C. Whether the Variable Contribution Limits Were Closely Drawn to Address the Interest

The court's next task was to determine whether Proposition 208's contribution limits were sufficiently "closely drawn" to serve the asserted governmental interests. The court applied the "closely drawn" test in this contributions limits case as opposed to the more stringent "less restrictive means" test, which is the test the United States Supreme Court has applied to other types of laws that infringe First Amendment rights. In applying the test, the court was particularly troubled by the fact that, under Proposition 208, contribution limits could be doubled by a candidate agreeing to spending limits in his or her campaign. California Prolife Council, 1998 WL 7173, at *8-9. The court concluded that the lower contribution limits in Proposition 208's variable limit scheme were not closely drawn and, therefore, were constitutionally infirm. California Prolife Council, 1998 WL 7173, at *9. The court held that the electorate's adoption of variable contribution limits meant the voters had necessarily concluded that the higher limit adequately addressed the governmental interest in preventing corruption. California Prolife Council, 1998 WL 7173, at *9. This, in the judge's opinion, required the court to find that the lower limits were not narrowly drawn to meet a legitimate governmental interest. Id. Therefore the lower campaign contribution limits are constitutionally infirm. Id.

D. Whether Proposition 208's Contribution Limits Impermissibly Limited Effective Advocacy by Contributors and Candidates

Upon examination of the third prong of plaintiffs' attack, the court found another constitutional infirmity in Proposition 208. Plaintiffs asserted that Proposition 208 set contribution limits so low that "candidates will not be able to marshal sufficient assets to campaign effectively." California Prolife Council, 1998 WL 7173, at *10. After reviewing a "wealth of factual and opinion evidence" in support of plaintiffs' position, the court observes there are

> myriad facts which, taken together, require the court to conclude that on the record made at trial the effect of the initiative is not only to significantly reduce a California candidate's ability to deliver his or her message, but in fact to make it impossible for the ordinary candidate to mount an effective campaign for office.

California Prolife Council, 1998 WL 7173, at *10.

In so holding, the court rejected defendants' arguments, which were based in part on evidence that other states have similar or lower campaign contribution limits and that the City of San Diego has campaign limits comparable to those found in the initiative. Although he found defendants' arguments "not without substance," the court concluded that they could not prevail against plaintiffs' evidence. California Prolife Council, 1998 WL 7173, at *10.

Defendants first argued that the limits approved in Buckley v. Valeo and limits adopted in other states and cities defeated plaintiffs' claims. The court disagreed. The court stresses that it relied heavily on the record before it in concluding that "the contribution limits will prevent the marshaling of assets sufficient to conduct a meaningful campaign." California Prolife Council, 1998 WL 7173, at *10 (footnote omitted). In fact, the existence of an extensive record in this case distinguishes it from Buckley v. Valeo, in which there was simply no record indicating whether the campaign contributions limits in the federal law would have had a "dramatic adverse effect on the funding of campaigns and political associations." California Prolife Council, 1998 WL 7173, at *10, citing Buckley v. Valeo, 424 U.S. at 21. Buckley v. Valeo "contrasts with the instant record where the court has concluded that the contribution limits will prevent the marshaling of assets sufficient to conduct a meaningful campaign." California Prolife Council, 1998 WL 7173, at *10.

The judge also rejected defendants' arguments that were based on the existence of other comparable state or local contribution limits, saying his conclusion was not "undermined by the existence of campaign limits in other jurisdictions." California Prolife Council, 1998 WL 7173, at

*10. "The facts pertinent to each jurisdiction, such as the size of the district, the cost of media, printing, staff support, news media coverage, and the divergent provisions of the various statutes and ordinances undermines the value of crude comparisons." California Prolife Council, 1998 WL 7173, at *10. Whether a particular jurisdiction's law prevents candidates from effective advocacy "'is fact-dependent, drawn from all of the record evidence and an evaluation of the witnesses' credibility.'" California Prolife Council, 1998 WL 7173, at *10, quoting National Black Police Assn v. District of Columbia Bd. of Elections and Ethics, 924 F. Supp. 270, 281 (D.D.C. 1996), vacated as moot 108 F.3d 346 (1997). "[E]very jurisdiction is *sui generis*, and thus every campaign contribution limitation must be judged on its own circumstances." California Prolife Council, 1998 WL 7173, at *10, citing The City of San Diego laws in footnote 37.

Defendants asked the court to apply the general rule that courts should not second guess a legislative determination concerning where the line for contribution limits should be drawn. California Prolife Council, 1998 WL 7173, at *7, 11. Plaintiffs argued, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say a $2,000 ceiling might not serve as well as a $1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind." California Prolife Council, 1998 WL 7173, at *7, quoting Buckley v. Valeo, 424 U.S. at 30. The court gave short shrift to this argument and held that the initiative commanded a change in kind, not simply in degree. California Prolife Council, 1998 WL 7173, at *11.

Finally, defendants argued that the court should defer to the predictive judgment of the electorate that necessarily is to be implied from its adoption of Proposition 208. Giving serious consideration to this argument, the court examined the amount of deference a court must give to the electorate by analogizing it to the amount a court must give to a legislative body. The court decided it must apply California's "sliding scale" test of deference, that is, accord significant deference to economic judgments but employ "greater judicial scrutiny" when the law impinges on a constitutional right. California Prolife Council, 1998 WL 7173, at *11.

> [D]eference in the federal courts is not simply a function of the separation of powers doctrine. It also rests upon the legislative branch being "better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon . . . complex and dynamic" issues . . . . [G]iven that the statutes at bar are the product of the initiative process, their adoption did not enjoy the fact gathering and evaluation process which in part justifies deference.

California Prolife Council, 1998 WL 7173, at *11 (citation omitted).

In the end, the court granted limited deference to the electorate's "implied findings" in adopting Proposition 208, and stressed that deference did not preclude meaningful judicial review. California Prolife Council, 1998 WL 7173, at *12. The court was faced with a wealth of strong evidence directly contradicting the "implied findings" he found in the electorate's actions, and the court "made factual findings as to the ability of candidates to marshal sufficient assets to effectively communicate" under California's campaign laws. California Prolife Council, 1998 WL 7173, at *12. The court concluded that the evidence commanded "a conclusion inconsistent with the implicit legislative finding" and that the "implied finding cannot stand even after according it due deference." California Prolife Council, 1998 WL 7173, at *12.

In its final conclusion on the merits of the case, the court held that "the contributions limits must fail because they are set at a level precluding an opportunity to conduct a meaningful campaign." California Prolife Council, 1998 WL 7173, at *12.

E. Severability of Proposition 208's Anchor Provisions from Other "Conceivably" Constitutional Provisions

The court called into question several other provisions of Proposition 208 because they appeared to be "justified solely on the basis that they are required to prevent subversions of the campaign limitation provisions." California Prolife Council, 1998 WL 7173, at *12. The court specifically mentioned that the limitations on contributions to and from political parties (sections 85303 and 85304), to and from PACs (sections 85301 and 85309), the aggregate limitations (section 85310), and the transfer ban (section 85306) cannot stand since their justifying provision is unconstitutional. California Prolife Council, 1998 WL 7173, at *12. The judge also said that other provisions, for example, the spend down provisions (section 89519), the prohibition on the use of campaign funds for office expenditures, (section 85313), the provisions concerning disclosure in advertising (sections 84501 through 84510), and the provisions concerning slate mailers (section 84305.5) appear to have separate justifications for their adoption and therefore "conceivably are constitutional," if they could be severed from the tainted portions. California Prolife Council, 1998 WL 7173, at *12. The court found that severability and reformation (rewriting) were matters for the state courts to decide, and as part of his order he directed the

defendants to seek an original writ in the California Supreme Court to determine whether severability and reformation were proper. California Prolife Council, 1998 WL 7173, at *13.

Because of outstanding issues regarding severability and reformation, the court determined that temporary, but not permanent, injunctive relief was appropriate. The court enjoined the FPPC from enforcing any provision of Proposition 208 pending further order of the federal district court. California Prolife Council, 1998 WL 7173, at *15. The FPPC has since issued a press release saying it will seek an appeal of the U.S. District Court's decision to the Ninth Circuit Court of Appeals, but that it would not seek a stay of Judge Karlton's decision. Cal. Fair Political Practices Comm'n., FPPC Will Appeal Proposition 208 Decision (press release Jan. 15, 1998).

F. Summary of San Diego's Contribution Limits

The City of San Diego's campaign finance laws are set forth in chapter II, article 7, division 29 of the San Diego Municipal Code. SDMC §§ 27.2901-27.2975. Section 27.2941 sets forth a contribution limit of $250 per election to candidates, campaign committees and independent expenditure committees, whereas section 27.2947 prohibits campaign contributions from anyone except an individual. Section 27.2941 reads in relevant part:

> (a) It is unlawful for a candidate, committee supporting or opposing a candidate, or person acting on behalf of a candidate or committee to solicit or accept from any person a contribution which will cause the total amount contributed by that person in support of or opposition to a candidate to exceed two hundred fifty dollars ($250) for any single election.
>
> (b) It is unlawful for any person to make to any candidate or committee supporting or opposing a candidate a contribution that will cause the total amount contributed by that person in support of or opposition to a candidate to exceed two hundred fifty dollars ($250) for any single election.
>
> . . . .

> (d) For purposes of Section 27.2941(a) and (b), the term "committee" includes but is not limited to a committee that makes independent expenditures.

SDMC § 27.2941.

Section 27.2947 reads in relevant part:

> (a) It is unlawful for a candidate, committee, committee treasurer or other person acting on behalf of a candidate or committee to accept a contribution from any person other than an individual.
>
> (b) It is unlawful for a person other than an individual to make a contribution to any candidate or committee . . . .

SDMC § 27.2947.

G. Effect of Ruling on San Diego's Contribution Limits

As mentioned above, the court devoted a footnote to San Diego's contribution limits. The footnote reads:

> Nor is it clear that the existence of limits is a demonstration of their efficacy. The court found concerning San Diego's limits, inter alia, that: "Under the $250 contribution limits in San Diego, the new forms of fundraising that have emerged are self-financing by the candidate, coordinated giving by business employees and illegal money laundering". . . . Moreover, the court found that: "The experience of the FPPC has been that jurisdictions with contribution limits experience an increase in illegal money laundering."

California Prolife Council, 1998 WL 7173, at *10 n.39, citing Findings of Fact Nos. 117, 118, California Prolife Council Political Action Committee v. Jan Scully, No. S-96-1965 (E.D. Cal. January 6, 1998) (visited Jan. 13, 1998) <http://www. caed.uscourts.gov/208fin.htm>.

The court made these remarks while discussing the third prong of plaintiffs' case, that is, in the context of deciding whether Proposition 208's contribution limits were so low that they effectively precluded a meaningful campaign. By implication the judge is raising that same question with respect to the City of San Diego's limits.

The court also made several specific findings about the City of San Diego, many of which cast doubt on the constitutionality of San Diego's contribution limits. The findings that specifically mention the City of San Diego are as follows:

> 110. The City of San Diego has since 1973 had a $250 per election limit on contributions to candidates, and in addition bans contributions from non-individuals, including corporations, labor unions, and PACs. The city's population (approximately 1.2 million) is roughly three times the size of a state assembly district (404,000), and one and one half times the size of a state senate district (808,000).
>
> 111. Candidates for city-wide office in San Diego having special advantages have raised large sums of money and run effective campaigns. For example, in Susan Golding's successful 1992 race for the open seat of Mayor of San Diego, she received over $1.1 million in contributions (approximately $385,000 for the primary election and $743,000 for the general election.)
>
> 112. The evidence demonstrated only 8 or 9 of approximately 88 San Diego city candidates since 1989 raised substantial campaign funds under the $250 limits.
>
> 113. Each of the candidates able to raise funds under the San Diego limits had special circumstances that made such fundraising possible.
>
> 114. Unlike State legislative races, San Diego City elections are generally high profile races that receive a great deal of media coverage from the newspaper, television and radio, thus helping candidates become known to potential contributors.
>
> 115. Due to the lack of media coverage, State legislative candidates are less likely to be able to raise funds under $250 limits than the San Diego candidates.
>
> 116. The $250 contribution limits in San Diego have given an advantage to candidates with personal wealth.
>
> 117. Under the $250 contribution limits in San Diego, the new forms of fundraising that have emerged are self-financing by the candidate, coordinated giving by business employees and illegal money laundering.
>
> . . . .

119. Among other effects of San Diego's contribution limits has been a marked increase in money laundering activities.

120. Independent expenditures have been on the increase in San Diego City races.

121. Corruption and the appearance of corruption were not reduced in the City of San Diego by the enactment of a $250 contribution limit for municipal elections.

Findings of Fact Nos. 110-121, California Prolife Council (No. S-96-1965).

In these findings, the court's primary focus was on the amount of money an individual may contribute to a campaign. San Diego's laws include other types of contribution limits. Significantly, the court noted in particular that San Diego prohibits contributions from non-individuals, including corporations, labor unions and PACs. Findings of Fact No. 110, California Prolife Council (No. S-96-1965). Although not mentioning any particular jurisdiction's laws, elsewhere he made another finding about limits on contributions to independent expenditure committees,[1] which is another type of contribution limit in San Diego's laws. Therefore, not only are San Diego's monetary limits called into question, so are its prohibitions against organizational contributions and its limits on contributions to independent expenditure committees.

H. Factors Distinguishing San Diego's Laws from Proposition 208 and the Court's Ruling on the Proposition

Although the court cast doubt on the City of San Diego's contribution limits, the court in fact made no ruling on San Diego's laws. San Diego's laws remain valid until a court rules otherwise. Several factors distinguish San Diego's laws from Proposition 208 and from the judge's analysis and ruling on the proposition.

[1] Finding number 196 reads: "Contributions to independent expenditure committees are not necessarily corrupting, nor do they necessarily give the appearance of corruption." Findings of Fact No. 196, California Prolife Council (No. S-96-1965).

1. San Diego does not have variable limits.

San Diego's contribution limits are set at $250 per candidate per election. In contrast, Proposition 208's limits were variable. The court determined that the electorate had impliedly found that the higher limits in some instances—when candidates agreed to accept spending limits—met the governmental interest in preventing corruption. By finding the higher limits adequately served that purpose in some instances, the electorate necessarily was held to have forfeited the argument for the necessity of the lower limits. California Prolife Council, 1998 WL 7173, at *8-9. San Diego's laws are not subject to attack on those grounds.

2. There has been no evidentiary hearing on San Diego's laws.

As Judge Karlton repeatedly stressed, especially in his remarks on the third prong, his conclusions were based heavily on the evidentiary record made at trial on Proposition 208. California Prolife Council, 1998 WL 7173, at *8, 10, 12. Although testimony about San Diego's laws was presented in the 208 trial, San Diego's laws were not at issue in the case and the evidentiary record was not developed with San Diego's laws in mind. The arguments for and against the validity of San Diego's laws were simply not fully litigated at the trial on Proposition 208. To date, San Diego has not had an opportunity to demonstrate in court that its laws meet a constitutionally valid purpose, are narrowly drawn to meet that purpose, and that its limits are not so low as to preclude a meaningful election campaign. San Diego's laws can be fairly judged on their merits only after a full evidentiary hearing.

3. A court should defer to the City Council's judgment in adopting its campaign finance laws, because an extensive legislative record supports those laws.

After lengthy discussion, Judge Karlton granted limited deference to the electorate's "implied findings" in adopting Proposition 208. California Prolife Council, 1998 WL 7173, at *11. Precisely because the initiative was adopted by the voters rather than by a legislative body, there was a dearth of express legislative findings to support the record. In contrast with Proposition 208, San Diego's laws have been adopted and amended by numerous City Councils since 1973. An extensive legislative record supporting the reasons for the laws is available to support the validity of the legislation.

4. San Diego's laws prohibiting organizational contributions and limiting contributions to independent expenditure committees were not before the court.

Judge Karlton's comments regarding San Diego's prohibitions against organizational contributions were dicta, Findings of Fact No. 110, California Prolife Council (No. S-96-1965), that is, they were not essential to any issue raised in the case and were gratuitously offered.

Prohibitions and limitations on organizational contributions and expenditures have been specifically upheld previously by the courts. See, e.g., Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990); California Medical Ass'n v. FEC, 453 U.S. 182 (1981).

The judge stated that contributions to independent expenditure committees are not necessarily corrupting. Findings of Fact No. 196, California Prolife Council (No. S-96-1965). In other words, the judge thinks as a general rule that limits on contributions to independent expenditure committees do not serve a legitimate governmental purpose. The judge did not make this remark about San Diego's or any other particular jurisdiction's law. But, because Judge Karlton made this finding, it raises the question whether this type of limit is valid, including the limits in San Diego.

Again we point out that no evidence was presented to Proposition 208's trial judge on the validity of these two aspects of San Diego's laws. There are strong factual and legal arguments in favor of upholding these two portions of San Diego's laws. Unless a court, after a full hearing, rules San Diego's laws invalid, they continue to be enforceable.

I. Next Step

My staff is currently evaluating our options. As the Enforcement Authority for the City's campaign ordinances, I am considering the filing of a legal action to resolve any questions about the constitutionality of the City's $250 contribution limits. We are consulting as well with other jurisdictions around the state that are faced with similar questions.

As soon as we come to a decision, I will inform you promptly.

Respectfully submitted,

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